

**BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA**

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<b>APPLICATION TO CHANGE WATER RIGHT NO. 41B 30122052 BY HRL INC.</b>	}	<b>PRELIMINARY DETERMINATION TO GRANT CHANGE</b>
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On February 20, 2019, HRL Inc. (Applicant) submitted Application to Change Water Right No. 41B 30122052 to change Water Right Claim No. 41B 142923 to the Helena Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department sent the Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), dated September 5, 2019. Koy Holland, the representative of HRL Inc. responded with the requested information on October 1, 2019, followed by e-mail correspondence dated October 4, 2019, and October 20, 2019 to clarify historic use. The Application was determined to be correct and complete as of September 17, 2021. An Environmental Assessment for this Application was completed on September 20, 2021.

**INFORMATION**

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Pre-Application:

- Pre-Application meeting with Koy Holland held February 20, 2019

Application as filed:

- Application to Change an Existing Irrigation Water Right, Form 606 IR
- Montana Sage Grouse Habitat Conservation Program approval letter, dated March 11, 2019
- Attachments
- Location Map

Information Received after Application Filed

- Response to the Department's deficiency letter, by Koy Holland, dated October 1, 2019

- E-mails from Koy Holland, dated October 4, 2019, and October 20, 2019.

#### Information within the Department's Possession/Knowledge

- Pre-Application meeting checklist
- Aerial photos and topographic maps
- Water right records, including files for the Statement of Claim proposed to be changed
- DNRC Technical Report, dated September 17, 2021
- Return Flow Analysis Report, Attila Felnagy, Groundwater Hydrologist, Water Management Bureau
- Montana Natural Heritage Program Wetland Guide
- USGS Streamflow Data
- Environmental Assessment dated September 20, 2021

The Department also routinely considers the following information. The following information is not included in the administrative file for this Application but is available upon request. Please contact the Helena Regional Office at 406-444-6999 to request copies of the following documents.

- Return Flow Memo, dated April 1, 2016
- Consumptive Use Methodology Memo, dated March 17, 2010
- Efficiency Policy Memo – change in method of irrigation, dated December 2, 2015

The Department has fully reviewed and considered the evidence and argument submitted in this Application and **preliminarily determines** the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA) as follows.

#### **WATER RIGHT TO BE CHANGED**

##### FINDINGS OF FACT

1. Applicant seeks to change the place of use (POU) of Water Right Claim No. 41B 142923. Statement of Claim 41B 142923 has a priority date of September 15, 1904. The Montana Water Court Preliminary Decree for Basin 41B, issued on May 9, 2013, identified an irrigation use of 306 acres for 41B 142923-00 in the SW of Sec. 29 (1 acre) and the N2 of Sec. 32 (305 acres) all in

Township 7 South (T7S), Range 9 West (R9W), Beaverhead County. This water right has a claimed flow rate of 3.75 cubic feet per second (CFS) and a volume of 100.7 Acre Feet (AF). The primary POD is a dam on Estler Reservoir located in the NWSENE of Sec. 29, T5S, R11W, and will not change. The secondary POD's are located in the NENWNW of Sec. 32 T7S, R9W. The claimed period of diversion is from January 1 to December 31, and the period of use is from July 1 to November 1 annually.

2. HRL, Inc. does not own the historic place of use. Per Quit Claim Deed No. 291581, recorded in Beaverhead County on 11/8/2018, Water Right Claim No. 41B 142923 was severed from the historical POU and conveyed to HRL, Inc. HRL is changing the POU and secondary POD's to supplement their land. An ownership update was filed on 1/11/2019 and processed 1/14/2019 by the Department to reflect ownership of HRL, Inc. as the owner of record for Claim No. 41B 142923.

**Table 1: WATER RIGHT PROPOSED FOR CHANGE**

WR Number	Purpose	Source	Flow Rate	Period of Use	Point of diversion	Place of use	Priority date	Acres
41B 142923	Irrigation	Estler Creek	3.75 CFS	July 1 – Nov 31	NWSENE Sec. 29, T5S, R11W	SW Sec. 29, N2 Sec. 32 T7S, R9W	Sep. 15, 1904	306

## **CHANGE PROPOSAL**

### **FINDINGS OF FACT**

3. The Applicant proposes to change the secondary points of diversion and place of use of Claim No. 41B 142923. The primary diversion is located in the NWSENE of Section 29, T5S, R11W, in Beaverhead County, and will not be changed. The historical place of use is 306 acres located in the SW of Section 29 (1 acre), and the N2 of Section 32 (305 acres), T7S, R9W, both in Beaverhead County.

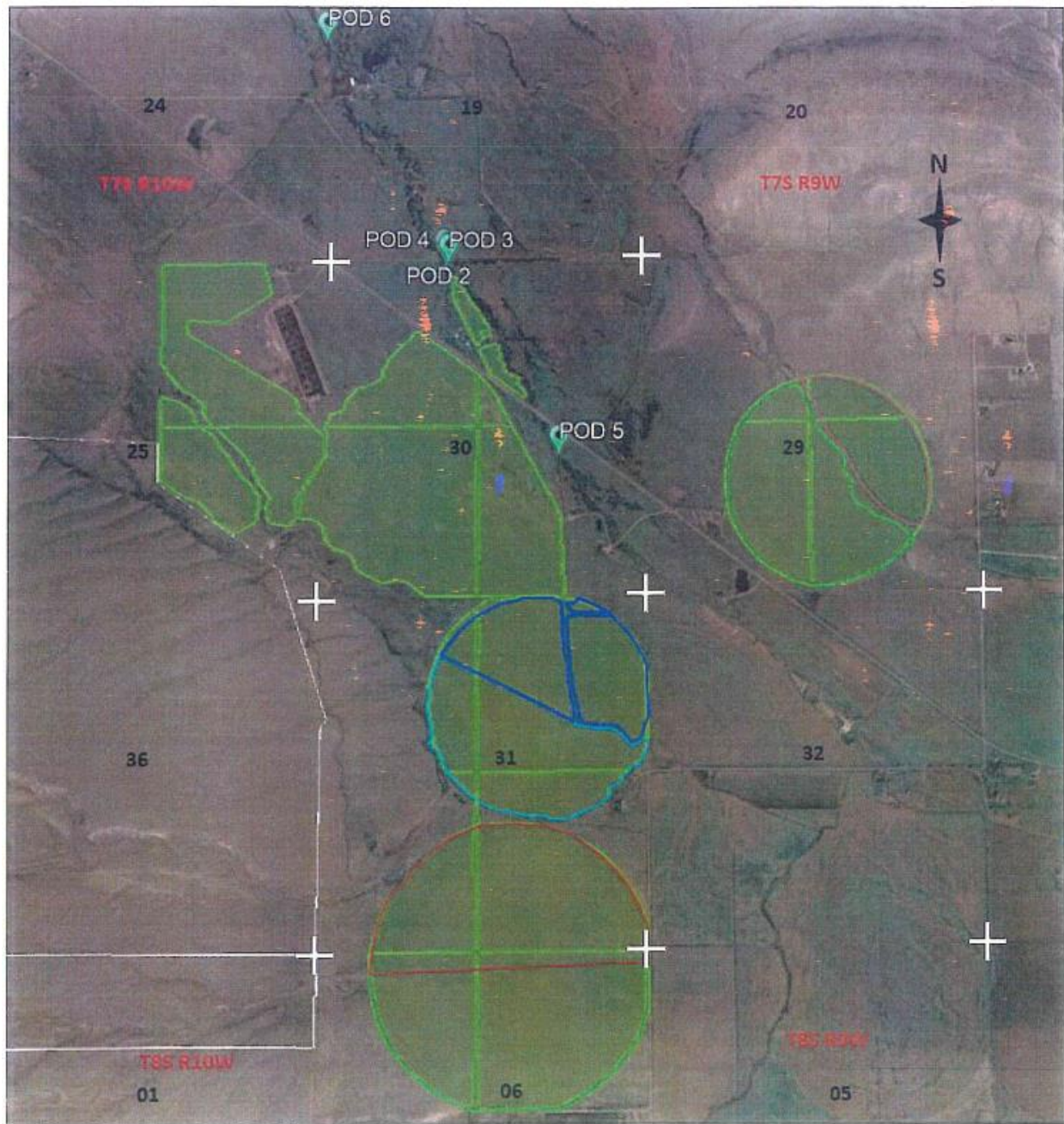
4. Water will continue to be released from the primary POD at Estler Reservoir using Rattlesnake Creek as a natural carrier to the proposed secondary points of diversion located in the NENENW (3 diversions), the NWNESE of Section 30, T7S, R9W, and the NESENE of Section 24, R7S, 10W, all in Beaverhead County.

5. The Technical Report Change Description lists one of the secondary POD's in the NWNESE of Section 30, T7S, R4W in Beaverhead County and should read in the NWNESE of Section 30, T7S, R9W in Beaverhead County. That error is now reflected correctly in this Preliminary Determination.

6. This storage right will be used to supplement the place of use of HRL's historic water rights from Rattlesnake Creek and Estler Creek, 41B 110576 – 41B 110588, (13 Claims) that irrigate 1168.40 acres. The proposed place of use is located in Section 29, 30, and 31 of T7S, R9W, the NE and SE of Section 25, T7S, R10W, and the NE and NW of Section 6, T8S, 9W, all in Beaverhead County, approximately 5 miles west of Dillon MT.

7. The proposed secondary diversions are already in place under the 13 existing rights. The proposed change will allow Claim No. 41B 142923 to supplement the Applicants existing irrigation rights when needed.

Figure 1: MAP OF PROPOSED PROJECT AREA (DEPARTMENT FILE)



## **CHANGE CRITERIA**

8. The Department is authorized to approve a change if the applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant's burden to prove change criteria by a preponderance of evidence is "more probably than not."); Town of Manhattan v. DNRC, 2012 MT 81, ¶8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in §85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

9. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. E.g., Hohenlohe, at ¶¶ 29-31; Town of Manhattan, at ¶8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

## **HISTORIC USE AND ADVERSE EFFECT**

### **FINDINGS OF FACT - Historic Use**

10. Statement of Claim 41B 142923 was decreed in the Basin 41B Preliminary Decree by the Montana Water Court with a flow rate of 3.75 CFS and a volume of 100.7 AF. Statement of Claim 41B 142923 is a storage right that releases water from Estler Reservoir from a primary POD which is a dam located in the NWSENE of Section 29, T5S, R11W, Beaverhead County. Water is released year-round via a slide gate with a 2 ft pipe outlet and a 4 ft Cutthroat Flume and uses Rattlesnake Creek as a natural carrier to two secondary POD's located in the NENWNW of Section 32, T7S, R9W, Beaverhead County, and the NESE of Section 30, T7S, R9W, Beaverhead County to flood irrigate the 306-acre POU.

11. Statement of Claim 41B 142923 has a POU that was supplemental to the following water rights listed in Table 2 below.

**Table 2: Historical Supplemental Water Rights**

W.R. NO.	FLOW	PURPOSE	PERIOD OF USE	Acres	PLACE OF USE	POINT(S) OF DIVERSION	PRIORITY DATE
41B 142920	1.25 CFS	Irrigation	4/01 – 11/01	140	NE Sec. 32 T7N R9W; NW Sec. 32 T7N R9W	NENWNW Sec. 32 T7S, R9W	06/01/1877
41B 142921	2.48 CFS	Fishery	5/01 – 10/31	166	SWSESW Sec. 29 T7S R9W; SW Sec. 29 T7S R9W; N2 Sec. 32 T7S R9W	SWSESW Sec. 29 T7S, R9W; SESWSW Sec. 29 T7S, R9W; SESESE Sec. 30 T7S R9W	06/01/1877
		Irrigation					
41B 142924	3.73 CFS	Irrigation	5/01 – 9/30	166	S2SW Sec. 29 T7N R9W; NW Sec. 32 T7S 9W; NE Sec. 32 7S 9W	NENWNW Sec. 32 T7S R9W	7/20/1887
41B 30150065	1.83 CFS	Irrigation	7/1 – 10/01	300	SWSW Sec. 29 T7S R9W; N2 Sec. 32 T7S R9W; NW Sec. 33 T7S, R9W	SESWNW Sec 10, T6S, R11W; NWNESE Sec. 30 T7S, R9W	5/27/1911
* 41B 142919 is erroneously remarked as being supplemental. The August 25, 2015 Master's Report clarifies the entire 186 acres of Claim No. 41B 142919 as being located in the N2 of Sec. 33, T7S, R9W.							

Figure 2: Supplemental Map from Table 2



12. The Applicant states that Supplemental Claim No. 41B 142920 with a flow rate of 1.25 CFS from April 1 to November 1 was historically used to irrigated 140 acres generally in the east half of the historical 306 acres. Supplemental Claim No. 41B 142921 historically irrigated 166 acres generally in the west half of the historical 306 acres with a flow rate of 2.48 CFS and was utilized from May 1 to October 31. The Applicant states that Claim No. 41B 142924 with a flow rate of 3.73 CFS is seldom in priority as it's a junior right to most on Rattlesnake Creek and would be utilized mainly during high water years. 41B 142924 is entirely supplemental to the 166 acres of 41B 142921. Supplemental Claim Nos. 41B 142920, 41B 142921, and 41B 142924 utilize water from Rattlesnake Creek as their main source of water. Claim Nos. 41B 142923 and 41B 142922 are storage water rights that release water from Estler Reservoir (41B 142923) and Kelley

Reservoir (41B 142922) and use Rattlesnake Creek as a natural carrier to the historical POU. Claim No. 41B 142923 was utilized as needed up to a total volume of 100.7 AF from July 1 to October 1 to irrigate the entire 306 historical acres. Supplemental Claim No. 41B 142922 is also a storage right that releases water from Kelley reservoir as needed up to a total volume of 17.97 AF and uses Rattlesnake Creek as a natural carrier to a secondary POD to irrigate 411 acres, 306 acres supplemental to all water rights listed in Table 2, and an additional 105 acres that are not supplemental and are located to the east of the historical 306-acre POU.

13. The Applicant has chosen to use the Department's administrative rules for defining historic consumptive use, found in ARM 36.12.1902. The Dillon weather station in Beaverhead County most closely resembles the place of use in elevation and climatic conditions. The historic consumptive use for all five supplemental water rights of 357.5 AF is based on this methodology.

Table 3: Total Historic Volume

<b>Historic Consumptive Volume (HCV) Flood</b>	<b>Beaverhead County Flood Irrigation Water Requirements (inches)</b>	<b>Historic Management Factor (Percent)</b>	<b>Historic Acres</b>	<b>HCV Acre-Feet (AF)</b>	<b>On-farm Efficiency</b>	<b>Field Application AF</b>	<b>Historic Irrecoverable Losses (IL) Flood 5%:</b>	<b>HCV AF (Including IL)</b>
41B 142920 41B 142921 41B 142924 <b>41B 142923</b> 41B 142922	18.34	63.7	306	297.9	25%	1191.6	59.6	<b>357.5</b>

14. The values in Table 4 below are derived from the proportionate volume contributed by each water right, as identified by the Applicant, historically used on the place of use involved in this change. The relative percentage contributed by each right was calculated to determine the relative Historic Consumptive Volume (HCV) for each right.

15. **Historic Diverted Volume: 1464.8 AF**

Historic diverted volume = (Vol.historic consumptive use/On-farm effic.) + Vol.conveyance loss  
 $(357.5 \text{ acre-feet}/0.25) = 1430 \text{ AF} + (34.86 \text{ AF}) = 1464.86 \text{ AF}$

Total seasonal conveyance loss calculations: 23.35 AF + 11.51 AF = 34.86 AF (See Tables 5 & 6 for each diversion.)

**Diversion #1**

Acres Irrigated = 166

Ditch Length = 2800 ft

**Table 4**

seasonal conveyance loss = seepage loss + vegetation loss + ditch evaporation		
seepage loss =	(wetted perimeter)(ditch length)(loss rate)(days)/43,560 ft2/acre	
wetted perimeter =	3.0 ft.	
ditch length =	2800 feet (0.53 mile)	(provided by applicant)
loss rate =	0.65 ft3/ft2/day	(based on web soil survey)
days irrigated =	123	(Abstract)
seepage loss =	(4.0 ft.)(2800 ft.)(0.65 ft3/ft2/day)(123 days) /43560 ft2	<b>20.55 acre-feet</b>
vegetation loss =	(% loss/mile)(flow)(days)(ditch length)(2 ft/ft3/s/d)-unit conversion constant	
% loss/mile =	0.0075	(NEH standard, 1993)
est. flow rate =	<b>2.03 ft3/s*</b>	(validated by supporting documentation)
days irrigated =	123	(applicant supplied, Form 606)
ditch length =	0.53 miles	
vegetation loss =	(0.0075)(2.03 ft3/s)(0.53 mi)(123 days)(2 ft./ft3/s/d) =	<b>1.98 acre-feet</b>
ditch evaporation =	(4.0 ft.*2800ft)(3.21)/43,560 ft2/ac	<b>0.82 acre-feet</b>
<b>seasonal conveyance loss =</b>	(20.55 acre-feet) + (1.98 acre-feet) + (0.82 acre-feet) = <b>23.35 acre-feet</b>	
*2.03 CFS is a proportionate flow rate for the 166 acres irrigated by Diversion #1		

**Diversion #2**

Acres Irrigated = 140

Ditch Length= 1800 ft

**Table 5**

seasonal conveyance loss = seepage loss + vegetation loss + ditch evaporation		
seepage loss =	(wetted perimeter)(ditch length)(loss rate)(days)/43,560 ft <sup>2</sup> /acre	
wetted perimeter =	3.0 ft.	
ditch length =	1800 feet (0.34 mile)	(provided by applicant)
loss rate =	0.65 ft <sup>3</sup> /ft <sup>2</sup> /day	(based on web soil survey)
days irrigated =	123	(Abstract)

seepage loss =	(3.0 ft.)(1800 ft.)(0.65 ft3/ft2/day)(123 days) /43560 ft2	9.9 acre-feet
vegetation loss =	(% loss/mile)(flow)(days)(ditch length)(2 ft/ft3/s/d)-unit conversion constant	
% loss/mile =	0.0075	(NEH standard, 1993)
est. flow rate =	1.72 ft3/s*	(validated by supporting documentation)
days irrigated =	123	(applicant supplied, Form 606)
ditch length =	0.34 miles	
vegetation loss =	(0.0075)(1.72 ft3/s)(0.34 mi)(123 days)(2 ft./ft3/s/d) =	1.08 acre-feet
ditch evaporation =	(4.0 ft.*1800ft)(3.21)/43,560 ft2/ac	0.53 acre-feet
seasonal conveyance loss =	(9.9 acre-feet) + (1.08 acre-feet) + (0.53 acre-feet) = 11.51 acre-feet	
*1.72 CFS is a proportionate flow rate for the 140 acres irrigated by Diversion #2		

**Table 6: Percentage of Total Historic Volume Diverted and Consumed**

WR Number	Diverted Volume	% of Total Volume	Portion of Total HCV
<b>41B 142923</b>	<b>100.7*</b>	<b>10*</b>	<b>35.75</b>
41B 142920	605.4	40	143.0
41B 142921	605.4	40	143.0
41B 142924	76.67	5	17.88
41B 142922	76.67	5	17.88
Total	1464.84	100	357.5
*Max diverted volume for 41B 142923 was calculated to 146.49 AF based on Applicants proportionate total volume. Claim No. 41B 142923 was decreed a volume of 100.7 AF that cannot be exceeded. The remaining volume of 45.79 AF has been proportionately split between the remaining water rights.			

### **FINDINGS OF FACT – Adverse Effect**

16. The proposed appropriation of water will not increase or expand the use of Claim No. 41B 142923. Claim No. 41B 142923 is a storage right that has been decreed a volume 100.7 AF out of Estler Reservoir for irrigation. There is a Water Commissioner that will monitor water released from Estler Reservoir to ensure this volume will not be exceeded. The Applicant proposes to use Claim No. 41B 142923 to supplement HRL's existing 13 irrigation claims (Claim Nos. 41B 110576-41B 110588).

17. The historical secondary point of diversions will be moved approximately 1 to 2 miles northwest and upstream of the historic POD's. The Applicant proposes to change only the

secondary point of diversions and place of use of Claim No. 41B 142923. The primary diversion is located in the NWSENE of Section 29, T5S, R11W, in Beaverhead County, and will not be changed. Water will continue to be released from the primary POD at Estler Reservoir using Rattlesnake Creek as a natural carrier to the proposed secondary points of diversion located in the NENENW (3 diversions), and the NWNESE of Section 30, T7S, R9W, and the NESENE of Section 24, R7S, 10W, all in Beaverhead County.

18. Claim No. 41B 142923 has been used regularly and as needed since originally appropriated. There have been no long periods of non-use.

19. The historic POU and proposed new POU are in general equidistant to Rattlesnake Creek. Under the conceptual model, historic return flows begin accreting at the upstream extent of the historic and proposed new POU and gradually increase to the total relative amounts at the downstream extent of the respective POU. Return flows from the proposed new POU, as with the historic POU, would continue to accrue to Rattlesnake Creek upstream of its confluence with the Smith Rebich Ditch.

20. The Applicants will not be able to call water rights they could not previously call. There will be no greater access to the water as a result of the proposed change.

21. A Water Commissioner is assigned to Rattlesnake Creek to distribute water and administer water rights in priority. HRL Inc. will continue to utilize their 13 existing water rights to both flood, and sprinkler irrigate their 1168.4-acre POU and will only utilize Claim No. 41B 142923 in dry years when needed. The Applicant states that the Water Commissioner monitors and measures all points of diversion in the stream or ditch, ensuring that the volume decreed will not be exceeded. The new supplemental consumptive use will not be any higher than the old consumptive use when limited to a max diverted volume of 100.7 AF that is monitored and measured by the Water Commissioner. The Water Commissioner has the authority to shut down water in the ditch if the head gates are not operable or water is exceeded.

## **BENEFICIAL USE**

### **FINDINGS OF FACT**

22. Applicant proposes to use water for irrigation which is recognized as a beneficial use under §85-2-102(2)(5), MCA.

23. Applicant proposes to use 100.7 AF diverted volume when needed to supplement irrigation of 1168.4 acres.

24. Claim No. 41B 142923 is a storage water right that is released from Estler Reservoir and will be used to supplement the Applicant's 13 claims as needed. Claim No. 41B 142923 uses Rattlesnake Creek as a natural carrier to the POU.

25. Water will supplement the place of use of HRL's historic water rights from Rattlesnake Creek and Estler Creek, 41B 110576 – 41B 110588, (13 Claims) that irrigate 1168.4 acres. In dry years, the Applicant does not get full-service irrigation on the existing 1,168.4-acre POU. The proposed change will help the Applicant attain full service by supplementing the existing water rights with Claim No. 41B 142923 when needed.

26. The proposed place of use is located in Section 29, 30, and 31 of T7S, R9W, the NE and SE of Section 25, T7S, R10W, and the NE and NW of Section 6, T8S, 9W, all in Beaverhead County, located approximately 5 miles west of Dillon MT.

### **ADEQUATE DIVERSION**

#### **FINDINGS OF FACT**

27. Applicant proposes to supplement their existing 13 Claims (Claim Nos. 110576 through 41B 110588), that have historically irrigated the 1168.4-acre POU with Statement of Claim No. 41B 142923, The existing primary diversion is a dam equipped with a slide gate with a 2 ft pipe outlet and a 4 ft Cutthroat Flume from Estler Reservoir will not change, and all proposed secondary POD's for the Applicant's Claims are adequate to divert the 3.75 CFS flow rate of Claim No. 41B 142923.

### **POSSESSORY INTEREST**

#### **FINDINGS OF FACT**

28. The applicant signed the affidavit on the application form affirming the applicant has possessory interest in the property where the water is to be put to beneficial use. Per Quit Claim Deed No. 291581 recorded in Beaverhead County on 11/8/2018 Claim No. 41B 142923 has been severed from the historical POU and conveyed to HRL. Inc. (Department file)

## **CONCLUSIONS OF LAW**

### **HISTORIC USE AND ADVERSE EFFECT**

29. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)("quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only"); Town of Manhattan, at ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).<sup>1</sup>

30. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that

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<sup>1</sup> DNRC decisions are available at:

[http://www.dnrc.mt.gov/wrd/water\\_rts/hearing\\_info/hearing\\_orders/hearingorders.asp](http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp)

Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11, 103 P.2d at 1072-74; Matter of Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.<sup>2</sup>

31. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.<sup>3</sup> A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the

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<sup>2</sup> See also Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979); Lokowich v. Helena, 46 Mont. 575, 129 P. 1063(1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, Gassert v. Noyes, 18 Mont. 216, 44 P. 959(1896)(change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff’s subsequent right).

<sup>3</sup>A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA

Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); Matter of Application For Beneficial Water Use Permit By City of Bozeman, *Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).<sup>4</sup>

32. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶44; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v.

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<sup>4</sup> Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)("[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right."); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo., 1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)("We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation"); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change .... The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo., 1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909); Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G76l By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 411 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); ARM 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).<sup>5</sup>

33. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

34. In Royston, the Montana Supreme Court confirmed that an applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There

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<sup>5</sup> The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana's water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell's flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31, 43, 198 P.3d 219, ¶¶ 22, 31, 43(citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law—that an appropriator has a right only to that amount of water historically put to beneficial use—developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights.

This fundamental rule of Montana water law has dictated the Department’s determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

Hohenlohe, at ¶¶ 42-45 (internal citations omitted).

35. The Department’s rules reflect the above fundamental principles of Montana water law and are designed to itemize the type evidence and analysis required for an applicant to meet its burden of proof. A.R.M. 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. A.R.M. 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. A.R.M. 36.12.1901 and 1903.

36. Applicant seeks to change existing water rights represented by its Water Right Claims. The “existing water rights” in this case are those as they existed prior to July 1, 1973, because with limited exception, no changes could have been made to those rights after that date without the Department’s approval. Analysis of adverse effect in a change to an “existing water right” requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In McDonald v. State, the Montana Supreme Court explained:

The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the provision of the 1972 Constitution is what the law has always contemplated in this state as the extent of a water right: such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use. . . . the Water Use Act

contemplates that all water rights, regardless of prior statements or claims as to amount, must nevertheless, to be recognized, pass the test of historical, unabandoned beneficial use. . . . To that extent only the 1972 constitutional recognition of water rights is effective and will be sustained.

220 Mont. at 529, 722 P.2d at 604; see also Matter of Clark Fork River Drainage Area, 254 Mont. 11, 17, 833 P.2d 1120 (1992).

37. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties, 295 Mont. 447, 453, 984 P.2d 151, 155 (1999)(Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust, 280 Mont. 196, 213, 930 P.2d 37, 47 (1996)(Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary, 212 Mont. 173, 180, 687 P.2d 712, 716 (1984) (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

38. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. E.g., In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., DNRC Proposal for Decision adopted by Final Order (2005). The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. See MacDonald, 220 Mont. at 529, 722 P.2d at 604; Featherman, 43 Mont. at 316-17, 115 P. at 986; Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004).

39. The Department has adopted a rule providing for the calculation of historic consumptive use where the applicant proves by a preponderance of the evidence that the acreage was historically irrigated. A.R.M. 36.12.1902 (16). In the alternative an applicant may present its own evidence of historic beneficial use. In this case Applicant has elected to proceed under A.R.M. 36.12.1902. (FOF No.10-15).

40. If an applicant seeks more than the historic consumptive use as calculated by A.R.M. 36.12.1902 (16), the applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be

less than the optimum utilization represented by the calculated duty of water in any particular case. E.g., Application for Water Rights in Rio Grande County 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., supra; Orr v. Arapahoe Water and Sanitation Dist. 753 P.2d 1217, 1223 -1224 (Colo., 1988)(historical use of a water right could very well be less than the duty of water); Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo. 1980) (historical use could be less than the optimum utilization “duty of water”).

41. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Water Right Claim No. 41B 142923 to be 100.7 AF diverted volume and 3.75 CFS flow rate with a consumptive use of 35.75 AF. (FOF No. 10-15)

42. Based upon the Applicant's comparative analysis of historic water use and return flows to water use and return flows under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA. (FOF No. 16-21)

### BENEFICIAL USE

43. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(5) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . .” McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. A.R.M. 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont.

373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)("The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes."); §85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

44. Applicant proposes to use water for irrigation which is a recognized beneficial use. §85-2-102(5), MCA. 100.7 AF of diverted volume and 3.75 CFS flow rate of water requested is the amount needed to sustain the beneficial use and is within the standards set by DNRC Rule. (FOF No. 22-26)

#### ADEQUATE MEANS OF DIVERSION

45. Pursuant to §85-2-402 (2)(b), MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. This codifies the prior appropriation principle that the means of diversion must be reasonably effective for the contemplated use and may not result in a waste of the resource. Crowley v. 6<sup>th</sup> Judicial District Court, 108 Mont. 89, 88 P.2d 23 (1939); In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC (DNRC Final Order 2002)(information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate).

46. Pursuant to §85-2-402 (2)(b), MCA, applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF No. 27)

#### POSSESSORY INTEREST

47. Pursuant to §85-2-402(2)(d), MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See also A.R.M. 36.12.1802

48. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF No. 28)

### **PRELIMINARY DETERMINATION**

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 41B 30122052 should be granted. The primary point of diversion is located in the NWSENE of Section 29, T5S, R11W, in Beaverhead County, and will not be changed. Water will supplement the place of use of HRL's historic water rights from Rattlesnake Creek and Estler Creek, 41B 110576 – 41B 110588, (13 Claims) that irrigate 1168.40 acres. The proposed place of use is located approximately 5 miles west of Dillon MT in Sections 29, 30, and 31 of T7S, R9W, the NE and SE of Section 25, T7S, R10W, and the NE and NW of Section 6, T8S, 9W, all in Beaverhead County.

### **NOTICE**

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§85-2-307, and -308, MCA. If this Application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and §85-2-309, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§85-2-310, -312, MCA.

DATED this 26th day of October 2021.

/Original signed by Jennifer Daly/

Jennifer Daly, Acting Regional Manager

Helena Regional Office

Department of Natural Resources and Conservation

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 26th day of October 2021, by first class United States mail.

HRL INC  
19200 MT HWY 278  
DILLON, MT 59725-9768

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Regional Office, (406) 444-6999